

Courts in a Populist World

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"I did not come to in order to be loved but in order to *voice the sentiments of the public*," said [Minister Miri Regev](#). Meanwhile, an Opposition Member of Knesset exclaimed that "we are here because we *reflect and represent the people*."¹Haim Jelin, Yesh Atid (party), Knesset Session/Sitting (3 August 2016) (our translation; emphasis added). These statements are emblematic of the rise of populist politics. The populist rhetoric exhibited by Israeli politicians signals a new development in Israeli politics. I call this development *public sentiment mirroring* (or "*mirroring*" for short). Mirroring requires the state to replicate in its policies the dominant or prevailing public opinions. It also requires weakening the power of institutions which "distort" the "authentic" voice of the public such as courts, the media, the academia and other "elitist" institutions.

Populist politics and populist judiciaries cast a shadow over constitutionalism. Coupled with vehement opposition to the so-called 'judicial activism' of the Israeli High Court of Justice (HCJ) and declining public confidence in the HCJ, populism poses a very real threat to Israel's constitutional order.

In Israel, the rise of populist politics has seen increasing public opposition to constitutionalism, and in particular to judicial review by the HCJ. By bolstering the case for mirroring the public and depicting the courts as inferior reflectors of public opinion (compared to the legislature or executive), populism threatens the authority of the courts. Courts have responded to this threat in different ways. Sometimes, courts themselves embrace populism. At other times, courts resist the populism, employing a range of principles to hold their ground, including legalism and core social values.

Courts Embracing Populism

Courts, in an attempt to defend their authority in the face of populism, can themselves resort to and take on the mantle of populism. How does this occur? To begin with, courts recognise the democratic deficit generated by populism. Then, in order to compensate for this democratic deficit, courts seek to themselves give effect to public convictions.

In the case of *Danilowitz*, Justice Dorner held that the same-sex partner of an air steward was entitled to the same benefits to which a different-sex partner would have been entitled. Dorner exclaimed that

*we cannot decide the petition before us without referring to the changes that have taken place with regard to social norms in Israel respecting homosexuality ... The principle of equality does not operate in a social vacuum. The question whether a certain case involves discrimination between equals, or whether it merely involves different treatment of different people, is decided on the basis of the accepted social outlooks.*²HCJ 721/94 *El Al Israeli Airlines Ltd. v. Danilovich* 48(5) PD 749 [1994] (Isr.) [1], [4] (Dorner J) (YU trans).

Dorner proceeded to examine the changing attitudes to, and norms surrounding, same-sex relationships. According to Dorner, the social acceptance of same-sex relationships compelled the Court to adopt a liberal interpretation of the relevant statute, giving legal expression to recently established social norms. Dorner's judgment implies that she maintained that she was better equipped (than politicians) to mirror public opinion. The legitimacy of her judgment, therefore, appealed to populist considerations.

The upshot of Dorner's judicial populism is ironic. Ordinarily, we might assume that a person's entitlement to a legal remedy would be enhanced by their facing social, economic and/or political discrimination. Yet, according to Dorner, this is not the case. Only those groups who *already* benefit from community understanding and

recognition can invoke judicial action and gain legal protection. In fact, the stronger the discrimination which an individual or group faces (such that the hardship of the victim is not understood or recognized), the weaker the justification for courts to intervene and protect them. Under judicial populism, at least in respect of discriminated groups and individuals, public opinion is the touchstone for judicial action.

Judicial populism, however, can also emerge in response to other stimuli. Sometimes courts — through their own volition — seek to anticipate developing public trends.³⁾David A. Strauss, "The Modernizing Mission of Judicial Review" (2009) 76 *The University of Chicago Law Review* 859, 888. At other times, courts wish to minimize friction between them and the elected branches of government,⁴⁾Strauss, pp 861–3. and in doing so become hyper-sensitive to the political ramifications of their decisions. By deferring to populist sentiment, either by exercising excessive restraint or by crafting their decisions to mirror public sentiment, courts may, ironically, experience a loss in public support, fracturing the backbone of the judicial system.

Courts Resisting Populism

Instead of embracing populism, sometimes, courts vehemently oppose populism. Courts can (and, on occasion, do) resist the integration of public opinion into judicial decision making. I explore two different grounds for this resistance: (a) legalism, and (b) core values.

Legalism

The legalist approach seeks to distance judges from the political realm. Legal, as opposed to political or other considerations, are supposed to shape judicial decision-making. Characteristic of this approach is the following pronouncement of Justice Moshe Landau, former President of the Supreme Court of Israel:

[T]here is still grave concern that the Court would appear to be abandoning its proper place and descending into the arena of public debate and that its ruling will be applauded by some of the public and utterly, vehemently rejected by others. In this sense, I see myself here as one whose duty is to rule in accordance with the law on any matter lawfully brought before the court. It forces me, knowing full well in advance that the wider public will not notice the legal argumentation but only the final conclusion and the appropriate status of the court, as an institution, may be harmed, to rise above the disputes which divide the public. Alas, what are we to do when this is our role and duty as justices.⁵⁾H CJ 390/79 Duwekat v Gov't of Israel [30] at p. 1 – cited in Arbel's judgment YU translation. Review trans. and condense where possible. — (emphasis added)

Landau believes that the courts gain their legitimacy through strict adherence to the law. It is therefore imperative that the judiciary remain insulated from public debate. If, as populism strives to achieve, imperative mandates of the public were to bind judicial decision-making, the public, rather than the law, would reign supreme. Judicial populism would therefore, according to the legalist approach, amount to a breach of the rule of law.

However, the rule of law, when defined narrowly, can mean little as *all* judges purport to “apply the law”. The rule of law is also often confused with literalism.⁶⁾The rule of law is also confused with minimalism. It is sometimes argued that to act 'legally' means to give great deference to other branches of government. We believe this is also erroneous as the question of what the law is, is a contested question and it is a semantic manipulation to presuppose that minimalism should be equated with legalism. The question of what the law is cannot be settled by 'a semantic sting'. It ought to be the byproduct of normative considerations. Some judges (and politicians) believe that the rule of law implies rigid adherence with the language of the law. This, of course, is highly controversial, but this view often is equated with the rule of law.

Core Values

Legalism, however, is not the only bulwark against populism. The core values approach also sees mirroring as highly problematic. According to the core values approach, mirroring undermines proper representation of the

public's core values *in the judicial sphere*. Core values differ from mirroring in that it aims to reflect not present public opinions but the values upon those opinions rest.

The core values approach recognizes that under populism first-order convictions, rather than underlying values, dictate policy and law-making, even in the judicial sphere. In addition, populism is inherently anti-pluralist; it does not reflect the full spectrum of the public's perspectives. Legalism is not itself sufficient to combat this trend. Courts, by adopting a broader, more holistic view of public convictions — rather than resorting to raw first-order convictions — can act to maintain plurality in law-making.

Under the core values approach, the legitimacy of courts is grounded not in strict adherence to law, but in a set of fundamental values which are shared by society as a whole ("*shared values*"). It is these shared values which ought to shape judicial decision-making.

Justice Barak appears to endorse the shared values approach. In response to a suggestion that the Court should not hear cases whose subject matter is the topic of fierce public debate and strong public sentiments, Barak opined that:

*Our legal education, our judicial experience and our faith in the law give us composure even in the midst of the turbulent mood which surrounds us. We are guided by principles and fundamental values, not transient spirits of the times.*⁷⁾H CJ 1635/90 Zarzevsky v. The Prime Minister, 45(1) PD 749, [28] (Barak P) (our translation).

Barak seeks to shield judicial decision-making from improper considerations, such as passing trends and public sentiment, by engaging underlying values.⁸⁾Aharon Barak, *The Judge in a Democracy* (2004) 47, 149; see also H CJ 4267/93 AMITAI—*Citizens for Right Administration and Integrity v. The Prime Minister of Israel Yitzhak Rabin* 47(5) PD 441, [44] (Barak J??) (published in Nevo 8 September 1993). In Barak's opinion, the fundamental values shared by society are not "a consensus formed by transient trends that are inconsistent with the society's fundamental values. ... When society is not being true to itself, judges are not required to give expression to its passing trends."⁹⁾Aharon Barak *supra* note 9 at 149. Barak guides judges to carefully draw on the public's underlying, higher-order convictions:

*It is precisely because the judge is not elected by the people and does not present them with a social and political platform that qualifies him express society's profoundest perceptions without being influenced by the needs of the moment. For this purpose, he must operate with judicial objectivity. He must express the outlook of society even if it is not his personal outlook.*¹⁰⁾CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221, [81] (Barak P) (YU trans.); see also H CJ 6163/92 Eisenberg v. Minister of Building and Housing [1993] IsrSC 47(2) 229, [52] (Barak P); Aharon Barak, *Selected Writings (Part A)* 942–3 (2000).

Confronting populism ultimately requires a combination of well-reasoned judgment and an ironclad will to resist the sometimes violent force of public opinion.

*A judge does not aspire to the noble and the pure ... he does not conjure up an unachievable, ideal society which does not exist in reality ... At the same time, he must avoid market-ethic pragmatism. A judge does not reflect the distorted views rampant in society ... The fact that "everyone does so" is not a criterion.*¹¹⁾H CJ 7074/93 *Swissa v. Attorney General* [1994] IsrSC 48(2) 749, [48].

According to shared values approach a judge's duty is to adjudicate disputes by giving effect to underlying

principles (and not just black-letter law), even if this means acting contrary to public sentiment. In all situations, but *especially* in the face of surging political populism, judges must recall and fulfill this basic mandate.

Ironically where the legislature becomes populist, courts have an obligation to compensate for this democratic deficit and actively defend the societal shared values. This additional responsibility, however, threatens to trigger judicial populism. In order to avoid this trap, courts (like integrative representatives in the political sphere) must remain vigilant, shield their decisions from fleeting changes to the public mood and draw on society's fundamental kernel of shared values.

References [+]

1. ↑ Haim Jelin, Yesh Atid (party), Knesset Session/Sitting (3 August 2016) (our translation; emphasis added).
2. ↑ HCJ 721/94 *El Al Israeli Airlines Ltd. v. Danilovich* 48(5) PD 749 [1994] (Isr.) [1], [4] (Dorner J) (YU trans).
3. ↑ David A. Strauss, "The Modernizing Mission of Judicial Review" (2009) 76 *The University of Chicago Law Review* 859, 888.
4. ↑ Strauss, pp 861–3.
5. ↑ HCJ 390/79 *Duwekat v Gov't of Israel* [30] at p. 1 – cited in Arbel's judgment YU translation. Review trans. and condense where possible. — (emphasis added)
6. ↑ The rule of law is also confused with minimalism. It is sometimes argued that to act 'legally' means to give great deference to other branches of government. We believe this is also erroneous as the question of what the law is, is a contested question and it is a semantic manipulation to presuppose that minimalism should be equated with legalism. The question of what the law is cannot be settled by 'a semantic sting'. It ought to be the byproduct of normative considerations.
7. ↑ HCJ 1635/90 *Zarzevsky v. The Prime Minister*, 45(1) PD 749, [28] (Barak P) (our translation).
8. ↑ Aharon Barak, *The Judge in a Democracy* (2004) 47, 149; see also HCJ 4267/93 *AMITAI—Citizens for Right Administration and Integrity v. The Prime Minister of Israel Yitzhak Rabin* 47(5) PD 441, [44] (Barak J??) (published in Nevo 8 September 1993).
9. ↑ Aharon Barak *supra* note 9 at 149.
10. ↑ CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221, [81] (Barak P) (YU trans.); see also HCJ 6163/92 *Eisenberg v. Minister of Building and Housing* [1993] IsrSC 47(2) 229, [52] (Barak P); Aharon Barak, *Selected Writings* (Part A) 942–3 (2000).
11. ↑ HCJ 7074/93 *Swissa v. Attorney General* [1994] IsrSC 48(2) 749, [48].

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